

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CL ABOR and MICHEALA ABOR,

Plaintiffs,

V.

THUY FRAZIER, ET AL.,

Defendants.

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No. 3:24-cv-522-K-BN

**FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE
UNITED STATES MAGISTRATE JUDGE**

Plaintiffs CL Abor and Micheala Abor filed a *pro se* complaint that is difficult to decipher but appears to assert claims against an attorney and law firm involved in a foreclosure proceeding against the Abors. *See* Dkt. No. 3.

United States District Judge Ed Kinkeade referred the Abors' complaint to the undersigned United States magistrate judge for pretrial management under 28 U.S.C. § 636(b) and a standing order of reference.

And, although the Abors paid the filing fee, after reviewing the complaint, the undersigned questions whether there is subject matter jurisdiction and, given the circumstances of this case, enters these findings of fact, conclusions of law, and recommendation that the Court should dismiss this action for lack of subject matter jurisdiction.

These findings and conclusions provide the Abors notice as to the jurisdictional deficiencies. And the ability to file objections to the undersigned's recommendation that this case be dismissed for lack of jurisdiction (as further explained below) offers

them an opportunity to establish (if possible) that the Court does have subject matter jurisdiction.

Legal Standards

“Jurisdiction is the power to say what the law is.” *United States v. Willis*, 76 F.4th 467, 479 (5th Cir. 2023). So consideration of “[j]urisdiction is always first.” *Louisiana v. U.S. Dep’t of Energy*, 90 F.4th 461, 466 (5th Cir. 2024) (citation omitted).

And, because “[f]ederal courts are courts of limited jurisdiction,’ possessing ‘only that power authorized by Constitution and statute,’” *Gunn v. Minton*, 568 U.S. 251, 256 (2013) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)), “subject-matter delineations must be policed by the courts on their own initiative even at the highest level,” *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583-84 (1999) (citations omitted).

The Abors chose to file this lawsuit in federal court and, by doing so, undertook the burden to establish federal jurisdiction. *See Butler v. Dall. Area Rapid Transit*, 762 F. App’x 193, 194 (5th Cir. 2019) (per curiam) (“[A]ssertions [that] are conclusory [] are insufficient to support [an] attempt to establish subject-matter jurisdiction.” (citing *Evans v. Dillard Univ.*, 672 F. App’x 505, 505-06 (5th Cir. 2017) (per cuiam); *Jeanmarie v. United States*, 242 F.3d 600, 602 (5th Cir. 2001))).

And, if they do not establish federal jurisdiction, this lawsuit must be dismissed. *See* FED. R. CIV. P. 12(h)(3) (“If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.”).

Because federal jurisdiction is not assumed, “the basis upon which jurisdiction

depends must be alleged affirmatively and distinctly and cannot be established argumentatively or by mere inference.” *Getty Oil Corp. v. Ins. Co. of N.A.*, 841 F.2d 1254, 1259 (5th Cir. 1988) (citing *Ill. Cent. Gulf R. Co. v. Pargas, Inc.*, 706 F.2d 633, 636 & n.2 (5th Cir. 1983)); *see also MidCap Media Fin., L.L.C. v. Pathway Data, Inc.*, 929 F.3d 310, 313 (5th Cir. 2019) (“Because federal courts have limited jurisdiction, parties must make ‘clear, distinct, and precise affirmative jurisdictional allegations’ in their pleadings.” (quoting *Getty Oil*, 841 F.2d at 1259)).

Under their limited jurisdiction, federal courts generally may only hear a case if it involves a question of federal law or where diversity of citizenship exists between the parties. *See* 28 U.S.C. §§ 1331, 1332.

In cases invoking jurisdiction under Section 1332, each plaintiff’s citizenship must be diverse from each defendant’s citizenship, and the amount in controversy must exceed \$75,000. *See* 28 U.S.C. § 1332(a), (b).

This amount “is determined by the amount of damages or the value of the property that is the subject of the action.” *Celestine v. TransWood, Inc.*, 467 F. App’x 317, 319 (5th Cir. 2012) (per curiam) (citing *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 347 (1977)).

And, “[f]or diversity purposes, state citizenship is synonymous with domicile. A change in domicile requires: ‘(1) physical presence at the new location and (2) an intention to remain there indefinitely.’” *Dos Santos v. Belmere Ltd. P’ship*, 516 F. App’x 401, 403 (5th Cir. 2013) (per curiam) (citations omitted); *see also Preston v. Tenet Healthsystem Mem’l Med. Ctr.*, 485 F.3d 793, 797-98 (5th Cir. 2007) (“In

determining diversity jurisdiction, the state where someone establishes his domicile serves a dual function as his state of citizenship.... Domicile requires the demonstration of two factors: residence and the intention to remain.” (citing *Stine v. Moore*, 213 F.2d 446, 448 (5th Cir. 1954)); *SXSW v. Fed. Ins. Co.*, 83 F.4th 405, 407 (5th Cir. 2023) (“‘The difference between *citizenship* and *residency* is a frequent source of confusion.’ For natural persons, § 1332 citizenship is determined by domicile, which requires residency plus an intent to make the place of residency one’s permanent home. An allegation of residency alone ‘does not satisfy the requirement of an allegation of citizenship.’” (emphasis in original; citations omitted)).

“The basis for diversity jurisdiction must be ‘distinctly and affirmatively alleged.’” *Dos Santos*, 516 F. App’x at 403 (quoting *Mullins v. TestAmerica, Inc.*, 564 F.3d 386, 397 (5th Cir. 2009)). And “a ‘failure to adequately allege the basis for diversity jurisdiction mandates dismissal.’” *Id.* (quoting *Stafford v. Mobil Oil Corp.*, 945 F.2d 803, 805 (5th Cir. 1991)).

Under Section 1331, federal question jurisdiction “exists when ‘a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff’s right to relief necessarily depends on resolution of a substantial question of federal law.’” *Borden v. Allstate Ins. Co.*, 589 F.3d 168, 172 (5th Cir. 2009) (quoting *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 27-28 (1983)); *see also In re Hot-Hed Inc.*, 477 F.3d 320, 323 (5th Cir. 2007) (“A federal question exists ‘if there appears on the face of the complaint some substantial, disputed question of federal law.’” (quoting *Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 366

(5th Cir. 1995))).

The “creation’ test ... accounts for the vast bulk of suits under federal law.”

Gunn, 568 U.S. at 257 (citation omitted). But

“a federal court [is also] able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues.” That is to say, “federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress.”

Perez v. Se. SNF, L.L.C., No. 21-50399, 2022 WL 987187, at *3 (5th Cir. Mar. 31, 2022) (per curiam) (quoting *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 312 (2005), then *Gunn*, 568 U.S. at 258).

Discussion

The undersigned first observes that, to the extent that the Abors assert claims against an attorney based on that attorney’s representation of a party adverse to the Abors in litigation, which appears to be the case, such claims could be subject to summary dismissal because they could “implicate Texas’s attorney immunity doctrine, a comprehensive affirmative defense protecting attorneys from liability to non-clients.” *Ramirez v. Ferguson*, No. 3:23-cv-2618-X-BN, 2023 WL 9953441, at *2 (N.D. Tex. Dec. 1, 2023) (cleaned up; quoting *Elliott v. Tucker*, No. 4:22-cv-135-O-BP, 2022 WL 17722672, at *5 (N.D. Tex. Nov. 29, 2022) (quoting, in turn, *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015); *Troice v. Greenberg Traurig, L.L.P.*, 921 F.3d 501, 505 (5th Cir. 2019)), *rec. accepted*, 2022 WL 17718519 (N.D. Tex. Dec. 15, 2022), *appeal dismissed*, 2023 WL 4491758 (5th Cir. Mar. 1, 2023)), *rec. accepted*,

2024 WL 922770 (N.D. Tex. Mar. 4, 2024).

But, as set out above, jurisdiction is first. And the Abors have not shown that the Court possess it.

Starting with federal question jurisdiction, the Abors cite a provision of federal law pertaining to the Federal Reserve System and discuss Rule 11 of the Federal Rules of Civil Procedure. *See* Dkt. No. 3 at 1 & 5-9. But neither's inclusion in the complaint shows a violation of federal law that is more than frivolous or insubstantial, such that the complaint establishes jurisdiction under Section 1331. *See Raymon v. Alvord Indep. Sch. Dist.*, 639 F.2d 257, 257 (5th Cir. Unit A Mar. 1981) (“[A] complaint that alleges the existence of a frivolous or insubstantial federal question is not sufficient to establish jurisdiction in a federal court.”); *Southpark Square Ltd. v. City of Jackson, Miss.*, 565 F.2d 338, 342 (5th Cir. 1977) (A claim “must be more than frivolous to support federal question jurisdiction.”).

For example, “[t]here is no private right of action under Rule 11.” *Wentworth v. Hedson*, 248 F.R.D. 123, 125 (E.D.N.Y. 2008) (citations as omitted).

Section 1331 confers federal jurisdiction in actions “arising under the Constitution, laws, or treaties of the United States.” It is true that a federal rule of civil procedure “has the force of a federal statute.” *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13 (1941). The question before us, however, is not whether the rules can be enforced, as can a statute, but whether the existence of such a rule (here, specifically, Rule 11) makes a case one arising under federal law. We hold that the rule is not a “law” in that sense but is instead a regulator of a party’s proceedings once that party is in federal court pursuant to another, independent jurisdictional grant. The rules, then, only implement the exercise of jurisdiction *otherwise* conferred by Congress and do not provide an independent basis for parties without any other jurisdictional grant to get into federal court in the first place. *See Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444-46 (1946).

Port Drum Co. v. Umphrey, 852 F.2d 148, 149-50 (5th Cir. 1988).

Nor could the Abors allege federal subject matter jurisdiction on a theory that the attorney that they have sued somehow violated their civil rights where liability under 42 U.S.C. § 1983 “results when a person acting under color of state law, deprives another of rights secured by the Constitution or federal law,” *Thurman v. Med. Transp. Mgmt., Inc.*, 982 F.3d 953, 956 (5th Cir. 2020) (cleaned up), and “private attorneys, even court-appointed attorneys, are not official state actors, and generally are not subject to suit under section 1983,” *Mills v. Criminal Dist. Court No. 3*, 837 F.2d 677, 679 (5th Cir. 1988).

The Abors also have not established the Court’s jurisdiction under Section 1332, as they fail to properly allege the citizenships of the defendants but also provide enough facts to allow the Court to reasonably infer that each plaintiff’s citizenship is not diverse from each defendant’s citizenship. *See generally* Dkt. No. 3.

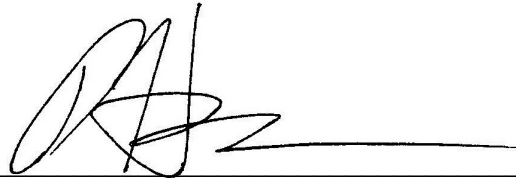
Recommendation

The Court should dismiss this lawsuit for lack of subject matter jurisdiction.

A copy of these findings, conclusions, and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions, and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge’s findings, conclusions, and recommendation

where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

DATED: March 7, 2024

A handwritten signature in black ink, appearing to read 'D. Horan', with a long horizontal line extending to the right.

DAVID L. HORAN
UNITED STATES MAGISTRATE JUDGE